

Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains

Frederick Brooks pleaded guilty to a drug charge in federal court. The plea was entered pursuant to a plea agreement in which the government promised to "recommend neither for nor against an executed sentence in this cause."¹ The government was silent at the original sentencing hearing, and Brooks received a four-year prison sentence and a \$5000 fine. Brooks then moved for a reduction of sentence, pursuant to Federal Rule of Criminal Procedure 35(b),² and the motion was denied after the government replied in

¹ Brooks v. United States, 708 F.2d 1280, 1281 (7th Cir. 1983).

² "The court may reduce a sentence within 120 days after the sentence is imposed" FED. R. CRIM. P. 35(b). The situation discussed here may also arise under state provisions that provide for reconsideration of the original sentence. See, e.g., CAL. PENAL CODE § 1203.3 (West 1982); ILL. REV. STAT. ch. 38, § 1005-5-3(d) (1983); 49 MINN. STAT. ANN. § 27.03(9) (West Supp. 1985); N.Y. CRIM. PROC. LAW §§ 420.10(5), 440.20 (McKinney 1983 & Supp. 1985); VT. STAT. ANN. tit. 13, § 7042(a) (Supp. 1984).

Rule 35 has been amended, effective November 1, 1986, by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837, 2015-16. The amended rule dispenses with motions for sentence reduction, employing a procedure of appeal and remand instead.

After November 1, 1986, all federal sentences will be imposed pursuant to sentencing guidelines promulgated by a newly created United States Sentencing Commission. *Id.* §§ 212, 217, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 1987-2011, 2017-26. Only "initial sentencing guidelines" will be in effect by November 1, 1986; additional guidelines will become effective six months after they are reported to Congress. *Id.* § 235(a)(1)(B), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 2031-32. Section 213(a) of the Act, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 2011-13, sets out the circumstances in which defendants and prosecutors may appeal a trial court's final sentence. Defendants may appeal sentences that exceed either the maximum established in an applicable guideline or the sentence specified in a plea bargain entered pursuant to FED. R. CRIM. P. 11(e)(1)(B) (plea bargains in which the prosecution promises to make a particular sentence recommendation or not to oppose defendant's requested sentence) or 11(e)(1)(C) (plea bargains in which the prosecution agrees that a particular sentence is appropriate). If there is no applicable guideline, a defendant may appeal a sentence that exceeds that specified in a Rule 11(e)(1)(B) or (C) plea bargain. Likewise, the prosecution may appeal a sentence that is less than either the minimum in an applicable guideline or that specified in a Rule 11(e)(1)(B) or (C) plea bargain; in the absence of a guideline, the prosecutor may appeal a sentence that is less than that agreed to in a Rule 11(e)(1)(B) or (C) plea bargain. Where an appeal by either party is successful, the appellate court has the option of remanding the question to the trial court for further sentencing proceedings.

In the event of such a remand, the issue of the government's continuing adherence to a sentence recommendation will be closely analogous to the issue discussed in this comment.

opposition to the motion for reduction.³ On appeal, the Seventh Circuit, in *Brooks v. United States*,⁴ held that the plea agreement did not bind the government to silence at any post-sentence proceeding and that the agreement had therefore not been breached.

The Seventh Circuit's analysis of the situation is typical of that of the federal courts generally: reasoning by analogy from the law of contracts, most courts interpret the government's promise as nonbinding at sentence-reduction proceedings.⁵ This comment will consider whether such exclusive reliance on principles from contract law is consistent with the judicial approach to other plea-bargaining controversies. It concludes that a more appropriate mode of interpreting the scope of disputed plea bargains only begins, but does not end, with the application of contract-law principles; recent Supreme Court decisions, invoking due process concerns in the enforcement of plea agreements, require that ordinary contract analysis not be the exclusive touchstone for interpreting such agreements.

Part I establishes a framework for this inquiry by examining the Supreme Court's analysis of the enforceability of plea bargains and shows that this analysis is relevant to the question of plea bargain interpretation as well. Part II criticizes the interpretive method employed in *Brooks* and other similar decisions. Part III concludes that a gap-filling or default presumption is necessary for cases in which the agreement is not clear and extrinsic evidence as to the parties' intent is unavailable; the Supreme Court's decisions governing plea agreements require that, under due process waiver analysis, the proper gap-filling presumption is to consider the prosecutor bound at subsequent sentence-reduction proceedings.

The prosecutor might argue that, under *Brooks*, he had fully performed at the original proceeding and that the defendant does not get a second chance at receiving the recommended or requested sentence, *see infra* text accompanying notes 57-58. Both in Rule 35(b) proceedings and under the new amended procedure, the sentencing judge is asked to reconsider the earlier sentence, and all of the factors that determined it, in light of new information. Under the new practice, the trial court will also have the appellate court's decision to consider. Under Rule 35(b), additional facts are provided in the defendant's motion or at the proceeding. *See United States v. Stromberg*, 179 F. Supp. 278, 280 (S.D.N.Y. 1959) (the court will not revise a sentence unless the defendant sets forth facts not considered before original sentencing).

³ The government argued that Brooks' present sentence was not excessive (the crime carried a maximum sentence of five years) and that Brooks had not shown any circumstances which would justify additional "mercy." *Brooks v. United States*, 708 F.2d 1280, 1281 (7th Cir. 1983).

⁴ 708 F.2d 1280 (7th Cir. 1983).

⁵ *See infra* notes 34-61 and accompanying text.

I. PLEA BARGAINING: CONTRACTUAL OR DUE PROCESS ANALYSIS?

In *Brooks*, the court rested its conclusion on the premise that a "plea bargain is, in law, just another contract."⁶ This assertion is called into question, however, by Supreme Court decisions addressing the enforceability of plea bargains.

A. Enforceability of Plea Agreements: *Santobello* and *Mabry*

In *Santobello v. New York*,⁷ the Supreme Court addressed the issue of the enforcement of plea agreements. A plea agreement had required that the defendant plead guilty to a lesser-included offense and that the prosecutor make no sentence recommendation. In the seven months that elapsed between Santobello's guilty plea and sentencing, a new prosecutor was assigned to the case and the original judge retired. The new prosecutor, unaware of his predecessor's promise of silence, recommended the maximum sentence. On these facts, the Supreme Court reversed the state court's sentence determination.

The Court began its analysis with an endorsement of the plea-bargaining procedure as "an essential component of the administration of justice,"⁸ but cautioned that the value of plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor."⁹ Therefore, the Court held, plea bargaining "must be attended by safeguards to insure the defendant what is reasonably due in the circumstances."¹⁰ The Court noted that, while circumstances will vary from one case to another, "a constant factor is that when a plea rests in any significant degree on a

⁶ *Brooks*, 708 F.2d at 1281.

⁷ 404 U.S. 257 (1971).

⁸ "The disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice. Properly administered, it is to be encouraged." 404 U.S. at 260. Four factors give plea bargaining its "highly desirable" status. Plea agreements lead to fast and final dispositions, reduce the negative impact of pretrial detention on defendants, eliminate pretrial release of dangerous defendants, and enhance "rehabilitative prospects" by shortening the delay between crime and punishment. *Id.* at 261.

It should be noted that the use of plea bargaining does not stem merely from these desirable effects. Plea bargaining "has become the ordinary dispositive procedure of American law." Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978). Up to 90% of all felony convictions in the state courts result from negotiated guilty pleas. Cramer, Rossman & McDonald, *The Judicial Role in Plea-Bargaining*, in PLEA-BARGAINING 139, 139 (W. McDonald & J. Cramer eds. 1980). Chief Justice Burger has estimated that a reduction in that figure to 80% would require a doubling of "judicial manpower and facilities." Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

⁹ 404 U.S. at 261.

¹⁰ *Id.* at 262.

promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”¹¹

This part of the opinion in *Santobello* seems to suggest that plea bargains are to be treated as ordinary contracts and that the defendant is simply entitled to the same degree of protection for his “bargain” as he would receive had he entered into a standard commercial contract. At another point in the opinion, however, the Court seemed to indicate that plea bargains might instead be analyzed according to the due process principles applicable to the waiver of the defendant’s right to a trial: “The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.”¹² The Court’s reasoning was made more uncertain by the fact that it did not cite any constitutional provision as the basis for its holding.¹³

This ambiguity was clarified by the recent decision in *Mabry v. Johnson*.¹⁴ In *Mabry*, the prosecution had withdrawn a proposed plea bargain after the defendant had accepted the government’s offer but before he had entered the bargained-for guilty plea. In holding that the defendant had no constitutional right to the enforcement of this plea bargain, the Court laid out the contours of the constitutional protection to be afforded a defendant who enters into a plea agreement: “A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing plea which implicates the Constitution.”¹⁵ The Court for the first time tied its holding to a specific constitutional provision, citing *Santobello* as an illustration of the proposition that “only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged

¹¹ *Id.* The Court did not require that the plea agreement be specifically enforced. Rather, it left to the state court’s discretion whether to require specific enforcement of the agreement or to permit the defendant to withdraw his guilty plea and begin the process anew. *Id.* at 262-63.

¹² *Id.* at 261-62.

¹³ There must have been some constitutional basis for the Court’s decision, however, because the Court would not otherwise have had jurisdiction to reverse the state court. See *Santobello*, 404 U.S. at 267 (Douglas, J., concurring); see also Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 474-75 nn.10, 11 & 13 (1978).

¹⁴ 104 S. Ct. 2543 (1984).

¹⁵ *Id.* at 2546.

under the Due Process Clause.”¹⁶

Mabry thus makes clear that due process concerns are implicated in the process of enforcing a plea agreement. Although a defendant has no right to call upon the prosecution to perform while the agreement is wholly executory, once the defendant has given up his bargaining chip by pleading guilty, due process requires that the defendant's expectations be fulfilled. *Mabry* reaches this result by analyzing the agreement as a waiver of the defendant's right to trial: “‘[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the . . . prosecutor, . . . must stand . . .’”¹⁷ If the defendant is not fully aware of the value or scope of the prosecutor's commitments, however, the defendant may withdraw his guilty plea.

Mabry and *Santobello* thus call for a combination of contractual and constitutional waiver analysis in approaching the formation and enforcement of plea agreements. They stand for the proposition that once the defendant has pleaded guilty pursuant to a plea agreement, a breach of the prosecutor's promise violates due process. Nevertheless, they leave open two sets of questions that are important in assessing the scope of prosecutorial sentence-recommendation commitments. First, what was the scope of the prosecutor's promise and did he breach that promise? Second, are these questions to be answered according to standards drawn from the law of contracts only, or is due process waiver analysis to be used as well?

B. The Interpretation of Plea Agreements

In *Santobello*, the Court implicitly found that a particular prosecutorial promise had been made, that the promise was an inducement or consideration for Santobello's guilty plea, and that the prosecutor had breached that promise.¹⁸ The Court did not need to make any such findings in *Mabry* since the defendant had not yet entered a guilty plea. Neither case needed to reach the issue that is central in cases like *Brooks*: how does one interpret the language of a plea agreement in order to determine (1) what the defendant has bargained for in consideration for his plea and (2) whether he has received what he bargained for. Until the scope of

¹⁶ *Id.* at 2547.

¹⁷ *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 755 (1970)).

¹⁸ See Westin & Westin, *supra* note 13, at 474 n.5.

the prosecutorial promise is clear, it is impossible to tell whether the constitutional concerns expressed in *Santobello* and *Mabry* should come into play.

The language of *Santobello* suggested two different ways of approaching the interpretation of plea agreements.¹⁹ By speaking in terms of promise and consideration, *Santobello* led many lower courts to the conclusion that plea agreements are to be treated like any other contract,²⁰ or are at least subject to direct application of contract law standards.²¹ *Mabry* indicated that plea agreements are not merely ordinary contracts,²² but it did not specify the extent to which contract law principles could appropriately be applied.

Mabry could be restated in contract terms: plea bargains are unilateral contracts created upon the defendant's performance, his plea.²³ On the other hand, the Court in *Santobello* evoked due process themes, which were later made explicit in *Mabry*. This aspect of *Santobello* influenced other lower courts to recognize that a defendant's rights arising from a plea agreement are not limited to the rights that would be accorded by commercial contract law.²⁴ By

¹⁹ *Brooks* and the other cases discussing prosecutorial adherence to a sentence commitment predate *Mabry*.

²⁰ *E.g.*, *State v. Kuchenreuther*, 218 N.W.2d 621, 624 (Iowa 1974) ("*Santobello* was not adjudicated on any constitutional ground but rather by application of what may be termed a 'fair-play standard.'"). *But cf. supra* note 13.

²¹ *See United States v. McIntosh*, 612 F.2d 835, 837 (4th Cir. 1979); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972). In this vein, it has been argued that the Court in *Santobello* created a "constitutional contract." *Westen & Westin, supra* note 13, at 528-31, 534-35, 538-39. Under such a view, a defendant's constitutional rights under a plea agreement are co-extensive with rights accorded by a contract analysis. *See Plaster v. United States*, 720 F.2d 340, 352 (4th Cir. 1983) ("[P]rinciples of fundamental fairness are satisfied by the application of normal contract principles in the plea bargain context where the contested issues involve the content of the agreement or the authority of the parties to enter into the agreement.").

²² By offering constitutional protection to a plea agreement once the defendant has performed, *Mabry* made clear that a defendant's rights under a plea agreement exceed the merely contractual. *See supra* text accompanying notes 15-16.

²³ Under *Mabry*, plea bargains are analogous to unilateral contracts because an enforceable contract is not created until the offeree performs. *See F. KESSLER & G. GILMORE, CONTRACTS* 290 (2d ed. 1970) ("[T]he doing of the act constitutes acceptance, the bargained-for consideration, and the offeree's performance."). This is not a new characterization of a plea agreement. *See Westen & Westin, supra* note 13, at 525 n.189. It has previously been noted that plea bargains cannot be viewed as executory bilateral contracts: the defendant, whose performance constitutes a waiver of his right to trial, may not be forced to perform his part of the bargain. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("[A] plea of guilty shall not be accepted unless made voluntarily . . ."); *State v. Brockman*, 277 Md. 687, 697, 357 A.2d 376, 383 (1976) ("[A]s the State concedes, it cannot obtain 'specific performance' of a defendant's promise to plead guilty.").

²⁴ *See infra* notes 26-33 and accompanying text.

stating that plea agreements are protected by due process once the defendant performs, *Mabry* buttressed this view.²⁵

This reading of *Santobello* and *Mabry* is consonant with the courts' general approach to plea bargains. Although courts often use contract analogies to police plea agreements, they have recognized that contract analogies do not offer the sole criterion for analysis.²⁶ In a commercial contract setting, for example, a court will construe as illusory, and hold unenforceable, any promise to perform that is conditioned on the promisor's discretion.²⁷ Where, however, the illusory promise is made by the government in the context of plea negotiations, the prosecutor has been held to be bound to the subsequent agreement and to his promise.²⁸ Illegal promises made in a plea bargain also receive treatment not in accord with standard contract law rules, which seek to leave parties to an illegal contract in the position in which the court found them.²⁹ A defendant who pleads guilty in reliance on an illegal

²⁵ See *supra* text accompanying notes 15-16. *Mabry* itself reversed one such court of appeals decision. In *Johnson v. Mabry*, 707 F.2d 323, 330 (8th Cir. 1983), the court held that "fairness" (a requirement derived from due process) precluded the prosecutor's withdrawal of a plea proposal once accepted by the defendant. In *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), the Fourth Circuit had reached the same result on similar facts. In reversing the Eighth Circuit in *Mabry*, the Supreme Court clarified when the constitutional protection of a plea bargain comes into play—upon the defendant's plea—but it did not object to the due process analysis used by the lower court.

²⁶ E.g., *Johnson v. Mabry*, 707 F.2d 323, 327-29 (8th Cir. 1983) (a plea agreement is unenforceable, under any theory, before the defendant's guilty plea has been accepted by the court), *rev'd on other grounds*, 104 S. Ct. 2543 (1984); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir.) ("analogy to contract law doctrines is not determinative in the area of plea negotiations"), *cert. denied*, 451 U.S. 1018, and *cert. denied*, 454 U.S. 831 (1981); *Palermo v. Warden*, 545 F.2d 286, 296 (2d Cir. 1976) (rejecting prosecution's argument that it was not bound by ultra vires promises: "[C]ivil contract . . . cases rest on totally different policy considerations than those which underlie plea bargaining"), *cert. denied*, 431 U.S. 911 (1977).

²⁷ See, e.g., *Davis v. General Foods Corp.*, 21 F. Supp. 445, 446 (S.D.N.Y. 1937) (promise to compensate solely in the promisor's discretion is illusory and cannot support a binding contract); *Calkins v. Boeing Co.*, 8 Wash. App. 347, 353, 506 P.2d 329, 332 (1973) (no cause of action in quasi-contract where employee offers valuable suggestion with knowledge of employer's rule providing discretionary rewards); *RESTATEMENT OF CONTRACTS* § 2 comment b (1932).

²⁸ The subordinate role of contract analysis was demonstrated in *People v. Tobler*, 91 Misc. 2d 69, 70, 397 N.Y.S.2d 325, 327 (Sup. Ct. 1977), where the prosecuting attorney had conditioned his promise on a matter of his "sole discretion." Recognizing that the bargain was unenforceable under principles of contract law, *id.* at 73, 397 N.Y.S.2d at 328, the court stated that "[t]here are considerations paramount to the power of individuals to contract," and held that "because of the significance of plea bargaining, it is important that the conduct of the Court and the District Attorney meet standards of basic fairness," *id.* See also *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (prosecution held to have breached a promise to consider recommending a reduced sentence).

²⁹ See F. KESSLER & G. GILMORE, *supra* note 23, at 60.

prosecutorial promise, however, has a right to have those promises fulfilled.³⁰ Mistake cases may also receive different treatment in the plea bargain context. When, for example, the prosecution entered into a plea bargain under the erroneous belief that the defendant's victim was not seriously injured, and the victim in fact died soon after the defendant entered his plea, the state was held to its bargain,³¹ although commercial contract law suggests that rescission is available when one party misunderstands the nature of what it is trading away.³²

Those plea bargain cases that reach beyond contract law generally deal with the enforcement of plea bargains and not with an interpretation of the terms of a disputed plea bargain. Nevertheless, the enforcement cases are based on principles that transcend their limited contexts. In accord with *Mabry*, they recognize that a fundamental change in the applicable analysis occurs once the defendant has entered his plea: strict contract principles are no longer sufficient. Furthermore, great weight is accorded a defendant's expectations of prosecutorial performance.³³ These basic principles are important to an understanding of ambiguous prose-

³⁰ In *Palermo v. Warden*, 545 F.2d 286 (2d Cir. 1976), *cert. denied*, 431 U.S. 911 (1977), the state argued that, although the defendant had entered a guilty plea, the state was not bound to perform its part of the bargain because the prosecutor had acted outside his authority by promising a favorable decision from the Parole Board after one year's incarceration. Noting that concerns of "fairness" and the constitutionally required voluntariness of a guilty plea limited "the extent to which . . . contractual defenses [can] be applied to plea bargaining," *id.* at 294, the court rejected the applicability of contract law cases as "resting on totally different policy considerations than those which underlie plea bargaining in the criminal justice system," *id.* at 296 n.16. See also *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973) (defendant who pleaded guilty on the basis of an "illegal" recommendation—one the prosecutor was forbidden by statute to offer—held entitled to specific performance of the plea bargain).

³¹ *State v. Thomas*, 61 N.J. 314, 294 A.2d 57 (1972).

³² See, e.g., *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1877) (rescission of unexecuted contract for sale of cow mistakenly thought to be barren); *Stong v. Lane*, 66 Minn. 94, 68 N.W. 765 (1896) (no contract for sale was created where parties negotiated the transfer of realty, but each was considering a different lot). But see *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885) (no rescission where plaintiff sold to defendant a stone of unknown value that was later discovered to be a diamond). Where the defendant did not realize what he was trading away, mistake has been held to justify the rescission of the plea agreement. See *In re Crumpton*, 9 Cal. 3d 463, 468, 507 P.2d 74, 77-78, 106 Cal. Rptr. 770, 773-74 (1973) ("It would be unconscionable to hold a defendant bound by a plea made under such significant and excusable misapprehension of the law.").

³³ Westen and Westin point to the large number of courts—state and federal—that have, pursuant to *Santobello*, ordered specific performance of plea bargains breached by the prosecutor. They consider this evidence of a constitutionalization of the defendant's expectation interests. Only specific performance—and not rescission—will give the defendant the benefit of the bargain he struck with the prosecutor. See Westen & Westin, *supra* note 13, at 519 & nn.165-67.

cutorial promises in the context of Rule 35(b) motions, and they help to show why the strict contract analysis employed in *Brooks* and related cases is inapposite.

II. JUDICIAL INTERPRETATION OF PROSECUTORIAL PROMISES: RULE 35(b) MOTIONS

In addressing the question of whether a prosecutorial promise, either to make no sentence recommendation or to recommend a particular sentence, carries over into a Rule 35(b) sentence-reduction hearing, most appellate courts have sought to apply an objective contract analysis. They have viewed plea bargains as if they were simple commercial contracts and have construed the language accordingly. There are two difficulties with these decisions. First, it is impossible to interpret the "plain meaning"³⁴ of a contract with ambiguous language or an omitted material term without calling upon some sort of gap-filling or default presumption. Second, exclusive reliance upon analogies to contract law is inadequate in the context of plea bargains.³⁵ One court noted the limited applicability of contract analysis in these terms: "The analogy between contracts and plea agreements works well in the *usual* plea bargain case, which involves the entry of a guilty plea, or the performance of some other action, following plea negotiations and *an agreement about specific terms*."³⁶

The first case to consider this interpretive problem was the Fifth Circuit's decision in *United States v. Ewing*.³⁷ In *Ewing*, the government had promised that it would not oppose probation; but when Ewing was sentenced to prison and moved for a reduction of the prison sentence to probation, the government opposed the Rule 35(b) motion. Finding that the government had fulfilled its promise at the original sentencing, the court nonetheless held that

³⁴ For an exposition of the "plain meaning" rule of contract construction, see 1 SAMUEL WILLISTON, *CONTRACTS* § 95, at 350 (3d ed. 1957) ("The court will give . . . language its natural and appropriate meaning; and, if the words are unambiguous, will not even admit evidence of what the parties may have thought the meaning to be."). Farnsworth deems the plain meaning rule unduly restrictive and suggests that it retains vitality because of "judicial skepticism as to the authenticity of proffered evidence of prior negotiations." E. ALLAN FARNSWORTH, *CONTRACTS* § 7.12, at 501-02 (1982), cf. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 318 (1983) ("It is easy for a defendant to make up a story about off-the-record promises or to assert that he did not know some important aspect of the arrangement.").

³⁵ See *supra* text accompanying notes 25-32.

³⁶ *Johnson v. Mabry*, 707 F.2d 323, 327 (8th Cir. 1983) (emphasis added), *rev'd on other grounds*, 104 S. Ct. 2543 (1984).

³⁷ 480 F.2d 1141 (5th Cir. 1973).

the plea agreement was breached by the government's opposition to sentence reduction. The court considered the distinction between the original sentencing hearing and the sentence-reduction hearing "of little import" because "both . . . were integral parts of the sentencing process."³⁸ Thus, the defendant's "expectation that the benefits of that promise would be available throughout the proceedings relevant to the determination of his sentence" was the controlling factor.³⁹ The "Government was obligated to fulfill its commitment at least until the question of Ewing's sentence was finally resolved by the sentencing judge."⁴⁰ The court reasoned that when the government promises not to oppose the defendant's requested sentence, and yet does oppose it at a Rule 35(b) proceeding, the government has breached the essence of the plea bargain⁴¹ as much as if the government had opposed it at the original sentencing.

The Second Circuit was the next court to consider this problem. In *Bergman v. Lefkowitz*,⁴² it began a process of erosion that eventually led to the rejection of the *Ewing* result. Bergman had pleaded guilty in state court in return for the prosecutor's promised recommendation that any sentence be concurrent with a recently imposed federal sentence. Despite that recommendation, the court imposed a consecutive sentence, and Bergman moved for a reduced sentence. The prosecutor opposed this motion, and the court refused Bergman's request.

Denying Bergman's petition for habeas corpus, the Second Circuit strictly construed the plea agreement as binding the prosecution only to make its original recommendation. The court noted that the language of the agreement imposed no requirements on the prosecution with respect to proceedings subsequent to the original sentencing.⁴³ The court did, however, take into account the defendant's expectations by inferring a contractual term that the defendant had an "entitlement" that the prosecutor "not cast

³⁸ *Id.* at 1143.

³⁹ *Id.*

⁴⁰ *Id.* The court did not invoke any particular canon of construction in reaching its conclusion. It is possible that it thought that it was simply interpreting the language on the "face" of the contract. Yet the stress it laid upon the defendant's expectation interests seems to belie such an analysis of its reasoning. See *supra* notes 25-32 and accompanying text; *infra* notes 85-101 and accompanying text.

⁴¹ See *United States v. Johnson*, 582 F.2d 335, 337 (5th Cir.) ("The government violates *Ewing* . . . when its opposition violates the essence of the plea bargain."), *cert. denied*, 439 U.S. 1051 (1978).

⁴² 569 F.2d 705 (2d Cir. 1977).

⁴³ *Id.* at 716.

doubt" on its original recommendation in subsequent proceedings.⁴⁴ This obligation had, in the court's opinion, been fulfilled. *Ewing* was distinguished on the basis that it involved a promise to refrain, not a promise to act:⁴⁵ the prosecutor in *Bergman* was not obliged to repeat a favorable recommendation, while the prosecutor in *Ewing* was barred from opposing a probated sentence.⁴⁶

Subsequent cases followed *Bergman* in applying a strict and literal contract analysis to questions of plea-bargain interpretation.⁴⁷ In these cases, the courts purported to look at the plain meaning of the contract terms. The term inferred in *Bergman*, that the prosecutor may not "cast doubt" on his earlier recommendation, had little impact,⁴⁸ and the courts continued to distinguish *Ewing*.⁴⁹ Finally, in *Brooks*, the Seventh Circuit, confessing that "the difference between distinguishing and rejecting is in this instance one of judicial decorum,"⁵⁰ rejected *Ewing*. *Brooks* unequivocally followed a plain meaning approach to the interpretation of plea agreements. The court examined the language of the agreement and concluded that the agreement neither stated on its face

⁴⁴ "Bergman's entitlement in [the Rule 35(b)] proceedings was simply that the Special Prosecutor should not cast doubt on his [previous] recommendation . . ." *Id.* at 716.

⁴⁵ "The case is thus readily distinguishable from *United States v. Ewing* . . . where the Government agreed not to oppose a probated sentence and then did precisely that on a Rule 35 motion." *Id.* at 716. The court appears to have reasoned that a promise to perform some act (e.g., make a recommendation) is fully executed once the act is performed.

⁴⁶ This distinction seems tenuous, however. The prosecutor's act in *Bergman* did cast doubt upon the first sentence recommendation and thus did frustrate the defendant's expectations. *Bergman* had requested a sentence reduced to what the state had recommended at the original sentencing; the state specifically opposed such a reduction, necessarily "casting doubt" on the sincerity with which it had previously recommended a concurrent sentence.

⁴⁷ See, e.g., *Brooks v. United States*, 708 F.2d 1280 (7th Cir. 1983); *United States v. Ligori*, 658 F.2d 130 (3d Cir. 1981); *United States v. Mooney*, 654 F.2d 482 (7th Cir. 1981); *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979); see also *In re Geisser*, 627 F.2d 745, 749 (5th Cir. 1980) (a guilty plea induced by a government promise creates an obligation that is contractual in nature), *cert. denied*, 450 U.S. 1031 (1981); *United States v. Miller*, 565 F.2d 1273, 1275 (3d Cir. 1977) (while the government must adhere to the terms of the agreement, it "will be held only to what it has [explicitly] promised"), *cert. denied*, 436 U.S. 959 (1978).

⁴⁸ An exception is *United States v. Mooney*, 654 F.2d 482 (7th Cir. 1981), where the court ruled that when the defendant moved for a reduction of sentence from 25 years to 10 years, the government was not barred from opposing the motion even though the government had agreed to recommend a 10-year sentence. The court held that the prosecutor's statement had been sufficiently "neutral" not to cast doubt on the previous recommendation.

⁴⁹ *United States v. Ligori*, 658 F.2d 130, 132 (3d Cir. 1981); *United States v. Mooney*, 654 F.2d 482, 485-86 (7th Cir. 1981); *United States v. Arnett*, 628 F.2d 1162, 1164-65 (9th Cir. 1979).

⁵⁰ *Brooks*, 708 F.2d at 1283.

that the government was bound in subsequent proceedings nor in any way indicated that such a term was implied.⁵¹ In so doing, the court established a new rule: unless the agreement states otherwise, the prosecution is in no way constrained at a sentence-reduction proceeding by any promise to remain silent or make a positive recommendation at a sentencing hearing.⁵²

None of the courts from *Bergman* to *Brooks* purported to rely on a per se rule that a government promise regarding a sentence recommendation never carries over to a post-sentence proceeding.⁵³ But they did reject the contrary rule—that such a promise must always carry over⁵⁴—and they claimed to rely instead on the plain meaning of the particular plea agreements at issue.⁵⁵ Analyzing the plea agreements as they would any other contract, these courts looked for the outcome that the parties to the contract—prosecutor and defendant—had bargained for. But in the fact situations involved in these cases, the written agreement did not indicate that there had been any bargaining on the scope of prosecutorial adherence to the plea agreement at a second hearing.⁵⁶ Because the parties' agreements did not specify a bargained-

⁵¹ *Id.* at 1282; see *infra* text accompanying notes 57-60.

⁵² *Brooks*, 708 F.2d at 1282.

⁵³ See *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979).

⁵⁴ See *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981). In *Ewing*, it is not clear whether the Fifth Circuit was laying down a gap-filling presumption or interpreting the "plain meaning" of that particular plea agreement. See *supra* note 34.

⁵⁵ See, e.g., *Brooks*, 708 F.2d at 1282 ("It is stretching the language of the agreement to interpret the government's opposition to [the sentence-reduction motion] as a recommendation [in favor of the imposed sentence]. And we do not see why the language should be stretched."). In *United States v. Ligori*, 658 F.2d 130 (3d Cir. 1981), the court based its finding that the parties had not intended to bind the prosecutor on the basic structure of the plea agreement. The prosecutor had promised to "'make no recommendation as to the sentence to be imposed.'" *Id.* at 131. When Ligori moved after sentencing for elimination of the imposed fine, the government responded with a letter urging the district court to leave Ligori's sentence unchanged. The Third Circuit ruled that the plea agreement bound the government to remain silent only at the original sentencing. Because the agreement allowed the government to correct inaccuracies in the pre-sentence report and at allocution, but made no allowance for the government to make similar corrections in response to a rule 35(b) motion, the court determined that neither party had considered the government to be bound at a reduction hearing. *Id.* But see *United States v. Block*, 660 F.2d 1086 (5th Cir. 1981) (a court will not recognize any promise that requires the government to remain silent in the face of factual misrepresentations at sentencing), *cert. denied*, 456 U.S. 907 (1982).

⁵⁶ None of the plea agreements mentioned the scope or duration of prosecutorial performance with any specificity. See, e.g., *Brooks*, 708 F.2d at 1281 ("The government would recommend neither for nor against an executed sentence in this cause."); *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979) (the government would "take no position as to the appropriate sentence"); *United States v. Mooney*, 654 F.2d 482, 484 (7th Cir. 1981) (prosecutor would recommend a 10-year sentence); *Bergman*, 569 F.2d at 707 n.3 (state prosecutor would recommend that no sentence be imposed in addition to any federal

for result, the courts were implicitly deciding between two outcomes on the basis of a "gap-filling" legal rule.

In *Brooks*, for example, the court did not merely interpret objectively the language of the agreement—to "recommend neither for nor against an executed sentence in this cause."⁵⁷ Rather, it established a presumption that where the plea agreement does not specify otherwise, a promise by the government to make no sentence recommendation does not bind the government after the original sentencing.⁵⁸ The court concluded that the words "in this cause" in the agreement have no "special significance."⁵⁹ Yet, under a "plain meaning" reading of "in this cause," the government's promise might indeed be interpreted as applying to the "cause." An objective definition of "cause" is a "question, civil or

sentence).

⁵⁷ *Brooks*, 708 F.2d at 1281.

⁵⁸ There are four possible reasons for setting the presumption against defendants. First, it might be thought irrelevant which way the presumption is set, so long as a certain rule is chosen. Thus, *Bergman* might be seen as precedent putting all parties on notice of the presumption, which suggests that it should be followed simply to avoid confusion. The problem with this argument is that any precedent can be said to provide notice, and *Ewing* (which presumes that a sentence recommendation promise remains binding throughout all sentencing proceedings before the sentencing judge) antedates *Bergman* by four years. This argument also depends on the assumption that there is no other basis for choosing one presumption over the other; as will be shown *infra* notes 85-102 and accompanying text, this assumption is false.

Second, the courts may simply be trying to discourage routine Rule 35(b) motions. If the defendant believes that he did not get a sufficiently lenient sentence while the government was silent (or was recommending a lenient sentence), he is not likely to try again if the government is no longer muzzled. But this raises the question of whether courts have the authority to limit a congressionally approved procedure—either under Rule 35(b) or in analogous situations that may arise under the new amendments (discussed *supra* note 2).

A third reason for the *Brooks* rule may be a concern with the overall balance of criminal procedure, which lodges discretion with the prosecutor and the benefit of presumptions with the defendant. There may be a fear that a contrary result in *Brooks* would both give the defendant the benefit of a presumption and eliminate the government's discretionary right to make sentence recommendations. This problem is ameliorated by the fact that the government can always opt out of the *Ewing* presumption by an explicit statement in the plea agreement.

Fourth, the concern might not be so much with preserving prosecutorial discretion as with limiting it. It may be thought that the protection of the public interest in criminal law enforcement requires government sentence-recommendation promises to be construed no more broadly than the language requires. As the court stated in *Brooks*, "The government gives up a lot when it gives up its right to oppose the defense counsel's arguments for leniency at the sentencing hearing; it would be giving up much more if it gave counsel another free shot at the judge in the form of a Rule 35(b) motion." 708 F.2d at 1282. But if the government promises more than what a court believes to be within prosecutorial discretion, it would be better to rebuke the government and permit the plea to be withdrawn than to penalize the defendant by nullifying the government's obligations.

⁵⁹ *Brooks*, 708 F.2d at 1282.

criminal, litigated or contested before a court of justice";⁶⁰ thus, a Rule 35(b) proceeding may fall within the very words that *Brooks* viewed as insignificant. Had the parties meant to apply the government's promise only to the first of two possible sentencing proceedings, the agreement could have said "in this proceeding." It strains the wording of the agreement to say that its language is susceptible of an objective interpretation when it is in fact so ambiguous.

These courts are not to be faulted for employing gap-filling presumptions. Some sort of gap-filling or default presumption is necessary whenever the plain meaning of the "contract" is not apparent on its face. Whether the interpretive problem arises because the parties did not consider the issue in their bargaining⁶¹ or because the parties employed ambiguous terms in setting their agreement, the court must have an interpretive rule from which to work. What is troublesome is the fact that the courts have been inferring an off-the-rack term under the guise of objective interpretation. By bringing the application of the presumptive term out into the open, one can examine its use and determine whether it in fact incorporates the appropriate presumption.

III. SHIFTING THE PRESUMPTION

The default presumption employed in *Brooks* and other cases is inappropriate because it relies too heavily on ordinary contractual analysis and gives no attention to the constitutional waiver analysis suggested in *Santobello*, and confirmed in *Mabry*, which compels a contrary presumption. Before the defendant performs, the parties to plea-bargain negotiations are free to contract as they wish—subject, of course, to the same limitations on duress, fraud, and unconscionability that apply in the commercial contract setting.⁶² But once the defendant performs by entering his plea, his expectation of prosecutorial performance is protected by due process.⁶³ When the defendant has entered a guilty plea on the basis of

⁶⁰ BLACK'S LAW DICTIONARY 201 (rev. 5th ed. 1979).

⁶¹ This is the more likely reason for the problem in these cases. See *Brooks*, 708 F.2d at 1283.

⁶² See *Walker v. Johnston*, 312 U.S. 275, 286 (1941) (guilty plea may not be the product of prosecutorial deception); *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (guilty plea must be voluntary); *State v. Thomas*, 61 N.J. 314, 320, 294 A.2d 57, 60 (1972) (dictum) (guilty plea may not be the result of deception by the defense); cf. Easterbrook, *supra* note 34, at 319-20 (suggesting that the requirement that a negotiated guilty plea have a factual basis is analogous to judicial scrutiny of unconscionable contracts).

⁶³ *Mabry*, 104 S. Ct. at 2548 (because defendant had no expectation of prosecutorial

a prosecutorial promise that later turns out to be ambiguous, contract analysis, while useful, must be informed by an examination of what the defendant reasonably expected in return for his performance.

A. Contract Analysis

All the prosecutorial promises interpreted by the courts in the previous sections failed to provide expressly for the contingency of a Rule 35(b) motion. The parties to such a contract must either have negotiated this point, but failed to set it out in their written agreement with sufficient clarity, or not have negotiated the point at all. If the first is the case, the contract is ambiguous because the language in the writing is susceptible of either of the two interpretations urged by the parties; in such situations, the court must decide which interpretation, if either, was in fact agreed upon.⁶⁴ If the parties did not negotiate the point, an implied term must be found to cover the unbargained-for contingency.⁶⁵

The plea agreement in *Brooks*, "to recommend neither for nor against an executed sentence in this cause," is ambiguous.⁶⁶ It is susceptible of different interpretations and, not surprisingly, the parties urged different meanings on the court *ex post*. If no extrinsic evidence is available to show that the parties gave the ambiguous term a common meaning at the bargaining stage,⁶⁷ the court cannot give meaning to a term about which the parties' expectations diverged.⁶⁸ Instead, in order to prevent the bargain from fail-

performance of withdrawn plea proposal, such negotiation did not affect the voluntariness or intelligence of his plea); see *supra* notes 25-32 and accompanying text.

⁶⁴ See E. FARNSWORTH, *supra* note 34, § 7.10, at 492-95.

⁶⁵ *Id.* § 7.15, at 517-20.

⁶⁶ See *supra* text accompanying notes 57-60.

⁶⁷ The Federal Rules of Criminal Procedure require a recorded verbatim record of the proceeding at which the defendant pleads guilty. FED. R. CRIM. P. 11(g). All terms of any plea bargain must be set out and recorded. It has been suggested that the requirement of a recorded exchange serves as a sort of statute of frauds for the plea contract. See Easterbrook, *supra* note 34, at 317-18; see also *McCarthy v. United States*, 394 U.S. 459, 469 (1969) ("Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding 'in this highly subjective area.'") (quoting *Heiden v. United States*, 353 F.2d 53, 55 (9th Cir. 1965)). Nonetheless, extrinsic evidence has been held admissible in disputes that have subsequently arisen over negotiated guilty pleas. "[T]he barrier of the plea or sentencing proceeding record, although impressive, is not invariably insurmountable." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); see also *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (there is no procedure for the taking of guilty pleas that is so reliable as to make guilty pleas "uniformly invulnerable to subsequent challenge"). The Court in *Blackledge* explicitly analogized to the modern relaxation of the parol evidence rule in contract law. 431 U.S. at 75 n.6.

⁶⁸ J. CALAMARI & J. PERILLO, *CONTRACTS* § 3-10, at 119 (1977); E. FARNSWORTH, *supra*

ing entirely, the court must supply a term to cover the unbar-gained-for contingency.⁶⁹

Under standard contract law, courts faced with such a gap in the contract can supply reasonable terms to fill those gaps.⁷⁰ As with commercial contracts, courts have clarified disputed plea agreements by supplying terms. For example, two of the most common terms read into commercial contracts—a duty to deal in good faith⁷¹ and a duty to use best efforts⁷²—have been used in the interpretation of plea agreements. The courts in *Bergman v. Lefkowitz*⁷³ and *United States v. Mooney*⁷⁴ imposed a duty of good faith by requiring the prosecutor not to “cast doubt” on his first sentence recommendation.⁷⁵ In another plea bargain case, a “best efforts” term was supplied when a prosecutor’s half-hearted delivery of a statement of agreed recommendation was not considered fulfillment of his promise.⁷⁶ In commercial transactions, courts will also supply terms providing for the scope or duration of perform-

note 34, § 7.9, at 487; RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) [hereinafter cited as RESTATEMENT]. The older view, as espoused by Professor Williston, see *supra* note 34, and applied in *Brooks*, see *supra* notes 57-60 and accompanying text, considers only the plain meaning of the words of the contract to be binding.

⁶⁹ Courts will often “substitute for the subjective test of shared expectation an objective test of whether one party should reasonably have known of the other’s expectation.” E. FARNSWORTH, *supra* note 34, § 7.16, at 523 (footnote omitted); see also RESTATEMENT, *supra* note 68, § 201(2) (court will interpret a disputed term consistent with the meaning urged by the party who did not know of, and had no reason to expect, the interpretation urged by the other party where the latter knew of, or had reason to know of, the former’s interpretation). If it is reasonable to assume that a defendant would expect the prosecutor’s promise to be binding on him at a Rule 35(b) proceeding, see *infra* notes 100-01 and accompanying text, one could adopt this rule of construction and conclude that the prosecutor should be aware of the expectation on the part of the defendant.

⁷⁰ RESTATEMENT, *supra* note 68, §§ 204, 272(2); see also E. FARNSWORTH, *supra* note 34, § 7.16, at 520-26.

⁷¹ See *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); E. FARNSWORTH, *supra* note 34, § 7.16, at 526-28. Such an implied term is codified in the RESTATEMENT, *supra* note 68, § 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”), and in the Uniform Commercial Code, U.C.C. § 1-203 (1978) (“Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”).

⁷² See, e.g., *Parev Prods. Co. v. I. Rokeach & Sons*, 124 F.2d 147, 150 (2d Cir. 1941); *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 266-67 (S.D.N.Y. 1978), *aff’d*, 601 F.2d 609 (2d Cir. 1979); see also U.C.C. § 2-306(2) (1978).

⁷³ 569 F.2d 705 (2d Cir. 1977).

⁷⁴ 654 F.2d 482 (7th Cir. 1981).

⁷⁵ See *supra* notes 44, 48 and accompanying text.

⁷⁶ *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974). But see *Bergman*, 569 F.2d at 715-16 (to avoid a plea bargain because of a prosecutor’s tepid recommendation would not promote the sound administration of criminal justice).

ance.⁷⁷ Such a term is also sometimes implied in the plea bargain context.⁷⁸

Most courts have implicitly assumed that a plea agreement's silence as to post-sentence motions means that the agreement does not govern such motions. This is a gap-filling presumption because the court is allocating the "burden of expression"⁷⁹ as to that term to the defendant. It would be an equally plausible allocation of the burden to say that the agreement does govern post-sentence motions because it does not say otherwise.⁸⁰ By reading the former rather than the latter term into the contract, *Brooks* decided that since the parties did not bargain over the question of the prosecutor's conduct at a Rule 35(b) hearing, the defendant bore the risk and the loss should lie where it fell.⁸¹

In the commercial setting, courts often allocate the burden of expression by allowing losses to lie where they fall.⁸² This has been attributed to an attitude of non-intervention, a related attitude that shifting the loss interferes with personal autonomy, and an application of a species of "social Darwinism" to the commercial

⁷⁷ *Maimon v. Telman*, 40 Ill. 2d 535, 537, 240 N.E.2d 652, 654 (1968) (court will supply a clause establishing duration); 22 West Main St., Inc. v. Boguszewski, 34 A.D.2d 358, 360, 311 N.Y.S.2d 565, 567 (1970) (implying a time limit for acceptance of an offer).

⁷⁸ In *United States ex rel. Robinson v. Israel*, 581 F.2d 1276 (7th Cir. 1978), the court found that a post-sentencing letter by the prosecutor to the Parole Board, urging that the defendant serve the maximum time under his sentence, violated a plea bargain in which the prosecutor had promised that he would recommend the sentence that the defendant later received. Upon a rehearing en banc, the Seventh Circuit reversed because of previous case law holding that proceedings before the Parole Board are not part of a criminal prosecution. *United States ex rel. Robinson v. Israel*, 603 F.2d 635, 638 (7th Cir. 1979) (en banc), cert. denied, 444 U.S. 1019 (1980). This opinion did not, however, criticize the analysis of the original panel. See also *United States v. Carbone*, 739 F.2d 45, 46-47 (2d Cir. 1984) (supplying a term of duration of prosecutorial performance in holding that a promise to make no sentence recommendation did not terminate when the sentence was orally announced by the judge).

⁷⁹ Courts are also influenced in deciding whether to supply a term by what might be called the "burden of expression." Although the parties can by express provision derogate from any term that the court would supply, the party who does this bears the burden of having the provision added to the agreement.

E. FARNSWORTH, *supra* note 34, § 7.16, at 525.

⁸⁰ The latter allocation might be rejected on the ground that it superimposes a term on the will of the parties. "But it is just the point that on the issues in question the parties *had no will at all*, so that any resolution of the problem is necessarily imposed by the court." CHARLES FRIED, *CONTRACT AS PROMISE* 64-65 (1981) (emphasis in original).

⁸¹ *Brooks*, 708 F.2d at 1283; see also *Mooney*, 654 F.2d at 486.

⁸² E.g., *Lloyd v. Murphy*, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944) ("If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed."); see RESTATEMENT, *supra* note 68, § 362.

world.⁸³ These attitudes, however, cannot be unthinkingly applied to the criminal justice system, which is interventionist by design and which gives the accused numerous procedural protections reflecting the fact that the parties in a criminal proceeding do not stand on an equal footing.⁸⁴

B. Plea Bargaining and Waiver of the Right to Trial

Standard contractual analysis in the plea-bargain context shows that *some* gap-filling presumption concerning the scope of prosecutorial performance is necessary if the plea agreement is to be enforced at all. It does not, however, compel the choice of one presumption over another: the appropriate choice is determined by the due process analysis set out in *Mabry*.⁸⁵

Because a guilty plea is a waiver of the fundamental right to a trial and is not necessarily a confession of guilt, constitutional waiver analysis applies.⁸⁶ Waiver of the right to trial, like any waiver of a constitutional right, "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."⁸⁷ An unambiguous plea agreement is consistent with the voluntary and intelligent requirements because it is a bargained-for exchange freely entered into by both parties.⁸⁸ When the meaning of the terms of a plea agreement is called into question, however, the requirement that negotiated guilty pleas be voluntary and intelligent affects the analysis in two ways.

First, for a plea to be intelligent, the defendant must know the scope of, and limitations upon, any promises made by the government.⁸⁹ If the plea agreement can be interpreted to reflect the

⁸³ C. FRIED, *supra* note 80, at 66.

⁸⁴ Cf. *Palermo v. Warden*, 545 F.2d 286, 296 n.16 (2d Cir. 1976) (rejecting analogy to standard contract analysis: such analysis "rest[s] on totally different policy considerations than those which underlie plea bargaining in the criminal justice system"), *cert. denied*, 431 U.S. 911 (1977).

⁸⁵ See *supra* notes 15-16 and accompanying text.

⁸⁶ See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (waiver of right to trial, not admission of guilt, is the necessary requisite for imposition of criminal sanctions); *Mabry*, 104 S. Ct. at 2547.

⁸⁷ *Brady v. United States*, 397 U.S. 742, 748 (1970); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is generally agreed that the requirement that the plea be "knowing" is identical to the requirement that the plea be "intelligent." See *Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 214-15 (1977); *Westen & Westin, supra* note 13, at 477 n.8; see also *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (guilty plea must be voluntary and intelligent).

⁸⁸ *Mabry*, 104 S. Ct. at 2547 (citing cases).

⁸⁹ *Id.*; *Santobello*, 404 U.S. at 261-62.

shared understanding of the parties, this requirement is satisfied. For the plea to be voluntary, however, any ambiguous or omitted terms in the agreement must be interpreted in accordance with the defendant's reasonable expectations: if the defendant does not understand the degree to which he may place reliance on government representations, his plea is not intelligent and knowing.⁹⁰

Plea bargaining entails a rational calculation of risks and benefits. In responding to a prosecutor's plea proposal, the defendant will compare the expected period of incarceration following a trial with the expected period of incarceration following a negotiated guilty plea.⁹¹ To do this, he must understand not only the elements of the offense with which he is charged⁹² but also the value of any government promises.⁹³ If the defendant does not understand the scope of prosecutorial promises, he cannot properly evaluate the risks inherent in the agreement.

Government sentence recommendation commitments fundamentally influence the defendant's calculus by altering the expected outcome of a sentencing proceeding. A prosecutor's recommendation of a short sentence increases the probability that such a sentence will in fact be imposed by the sentencing judge and thus

⁹⁰ See *United States v. Lester*, 247 F.2d 496, 501 (2d Cir. 1957) (Rule 11 requirement of voluntary plea "not satisfied if the plea is entered by one who is not fully aware of the consequences of his plea, nor fully aware of the extent to which reliance may safely be placed upon any representations which may have been made by the prosecutor").

⁹¹ See *Mabry*, 104 S. Ct. at 2547 (each side may obtain advantages when a guilty plea is exchanged for sentencing concessions); *Brady v. United States*, 397 U.S. 742, 756 (1970) ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted."). For example, if a defendant (1) thinks that he has a 50% chance of being convicted, (2) will receive a 20-year sentence if convicted, and (3) discounts each year to be spent in jail by a factor of 10% per year, he will find attractive any offer of less than 5.82 years in jail. Easterbrook, *supra* note 34, at 311. The 10% discount rate is an adjustment for the present value of years (much like the present value of money) and the risk preference of the defendant. *Id.* at 294-95.

⁹² In *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held invalid a guilty plea entered by a defendant who had not been informed by his attorney or the trial judge that intent was an element of the offense. It was not sufficient that the attorney knew of that fact: "[S]uch a plea cannot support a judgment of guilt unless it was voluntary in the constitutional sense. And clearly the plea could not be voluntary . . . unless the defendant received 'real notice of the true nature of the charge against him . . .'" *Id.* at 644-45 (footnote omitted) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)); see also *Henderson*, 426 U.S. at 650 (White, J., concurring) ("Our cases make absolutely clear that the choice to plead guilty must be the defendant's: it is *he* who must be informed of the consequences of his plea and what it is that he waives when he pleads . . .") (emphasis in original) (citation omitted).

⁹³ "[T]he state has an affirmative obligation to ascertain and disclose to the defendant with a reasonable degree of certainty the actual nature of his alternatives." Westen & Westen, *supra* note 13, at 510.

makes the plea agreement more attractive to the defendant. The calculus is also affected, however, by whether the prosecutor's promise extends to a sentence-reduction proceeding. The availability of the Rule 35(b) hearing enables the defendant to discount more heavily the possibility that a severe sentence will be imposed because it provides an opportunity for the court to reconsider unexpectedly or inappropriately heavy sentences. If the prosecutor is free to oppose such a correction, when the defendant expected that this would not be permissible, then the defendant will have underestimated the probability of a heavy sentence, and he will not have known the true value of the government's promises. Only by knowing the scope of the government's promise can the defendant make an intelligent, accurate calculation.

The second effect of the constitutional waiver analysis required by *Mabry* is that ambiguous terms in the agreement must be interpreted subjectively from the defendant's viewpoint.⁹⁴ Application of an objective interpretation, in disregard of the defendant's contrary understanding, makes the defendant's waiver involuntary,⁹⁵ so long as the defendant's construction of the promise was reasonable and he relied on it to his detriment.⁹⁶

When a defendant enters into a plea agreement under the reasonable impression that a particular promise has been made, he will act as if that promise—and not some other—has in fact been made. Consequently, the test of whether the resultant guilty plea is voluntary must be subjective.⁹⁷ If a court interprets the govern-

⁹⁴ See *United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976) ("Since the Government's promises, as reasonably understood by [the defendant], were not fulfilled, [he] was denied due process.") (emphasis added); *In re Valle*, 364 Mich. 471, 478-79, 110 N.W.2d 673, 677 (1961) (equating objective interpretations of government plea proposals with coerced confessions); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("The determination of whether there has been an intelligent waiver of [constitutional rights] must depend, in each case, upon the particular facts . . . including the background, experience, and conduct of the accused.").

⁹⁵ The "voluntary" rubric encompasses more than the absence of mental or physical coercion. It also means that the defendant "understands the significance of what he is doing and his ability to exercise his judgment with respect to a course of conduct best serving his needs is not unduly impaired or distorted by his predicament." *United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508, 514 (E.D.N.Y. 1967).

⁹⁶ See *Mabry*, 104 S. Ct. at 2548 (focusing on the defendant's state of mind as to what he bargained for); *United States v. Lester*, 247 F.2d 496, 501 (2d Cir. 1957) (court will enforce defendant's reasonable interpretation if promise is facially ambiguous).

⁹⁷ "If the actor—i.e., the defendant—believes that a promise has been made, the effect on his state of mind is exactly the same as if such a promise had in fact been made. Thus, any test of whether a person acts voluntarily is necessarily 'subjective.'" *United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508, 516 (E.D.N.Y. 1967); accord *United States v. Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).

ment's promise to "make no sentence recommendation" as not binding the government at a Rule 35(b) proceeding, while the defendant interprets the promise as binding until the sentence is finally determined, the court is enforcing a waiver of the defendant's rights to which the defendant did not agree.⁹⁸

If the defendant's subjective understanding of the plea agreement is apparent, it will be honored. If a plea agreement does not, either upon its face or upon the admission of extrinsic evidence, show the parties' shared expectations, the court must apply a gap-filling presumption to cover the omitted term. The gap-filling term that satisfies the constitutional requisites for a guilty plea is one that accords with a defendant's reasonable expectations, not with the intentions of the prosecutor.

It is a reasonable presumption that, at the bargaining stage, defendants expect to reap the benefits of their plea agreements during the entire sentencing process, whether the process is bifurcated or not.⁹⁹ The defendant has only one bargaining chip—his ability to impose procedural costs on the prosecution by insisting upon going to trial—and once he has used it by pleading guilty, he has nothing left with which to bargain.¹⁰⁰ In this situation, the defendant is bargaining for a particular end result—a guilty plea that will result in a lighter sentence than the one he would expect to receive after a trial. In light of the "consideration" given by a defendant for the government's promise,¹⁰¹ it is reasonable to expect continuing prosecutorial adherence to the agreement: a prosecutor's commitment to a specified sentence recommendation would be of little value if the government's tongue is to be freed at a later, related proceeding.

⁹⁸ In *Wood v. Commonwealth*, 469 S.W.2d 765 (Ky. 1971), the prosecutor promised not to oppose probation at sentencing, but then stated his opposition to the probation officer. The defendant's plea was held involuntary because it was induced by a government promise which was not "in spirit perform[ed]." *Id.* at 766.

⁹⁹ This discussion assumes that all parties are aware of the existence of Rule 35(b) motions.

¹⁰⁰ See Easterbrook, *supra* note 34, at 309 (defendant buys the plea by surrendering his opportunity to impose upon the government the costs inherent in his right to go to trial); *id.* at 313-15 (prosecutor sets the price at which he sells the plea by valuing the use of his prosecutorial resources on other cases).

¹⁰¹ If the value of the prosecutor's promise is destroyed by events prior to a sentence-reduction proceeding, the promise is of limited, fleeting value. Nevertheless, if the defendant gave substantial consideration for that promise, it is reasonable to assume that he valued it more highly because he considered it to be more permanent. *Cf. Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 120-21 (S.D.N.Y. 1960) (comparing market price with contract price may help in resolving the ambiguity of whether a contract for the sale of "chickens" means broiling or stewing chickens).

Where a plea agreement contains no express provision for Rule 35(b) proceedings and where there is no extrinsic evidence to show that the defendant raised the issue during plea negotiations, alternative inferences are possible. Either (1) the defendant believed that the government's sentence-recommendation promise bound the government at Rule 35(b) proceedings or (2) he believed that it did not bind the government but avoided raising the issue because he feared that the government would not agree to bind itself and he wished to claim later that he had had a contrary belief.

Even assuming that some defendants would adopt a stratagem of feigned naiveté, application of the *Brooks* presumption would thwart the reasonable expectations of a large number of other defendants. Blanket application of *Brooks* will thus lead to the enforcement of involuntary and unintelligent guilty pleas. Because it is reasonable for defendants to expect the government to adhere to a promised sentence recommendation or non-recommendation until the issue is finally decided by the sentencing judge, the rule of construction should reflect these expectations.¹⁰²

CONCLUSION

In interpreting prosecutorial promises to recommend a specific sentence or to refrain from making a recommendation, most courts have ruled that the prosecutor's promise does not extend to a Rule 35(b) motion. Such a rule is justified neither by other plea bargaining case law nor by analogy to modern contract law. When the parties' shared expectations are not ascertainable, either on the face of the agreement or by recourse to extrinsic evidence, a prosecutor's promise either to remain silent at sentencing or to make a favorable recommendation should be construed as binding the prosecution at a Rule 35(b) proceeding for sentence reduction. The application of such a default rule is consistent with modern contract law and realistically enforces defendants' expectations, so that plea bargains may properly be considered to have been knowingly and intelligently entered into by these defendants.

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¹⁰² In any event, the government retains the option of raising the specific issue and generating a record to prove any other expectations of the defendant. Since the government is a repeat player in plea negotiations, adopting this option as a matter of institutional routine will allow it to defeat defendants' attempts at strategic behavior in negotiations.